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THE CONSTITUTIONAL POWER OF THE UNITED STATES SENATE TO CONDITION ITS CONSENT TO TREATIES

MICHAEL J. GLENNON*

Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people.

—James Wilson¹

Domestic decisionmaking processes in the realm of foreign relations can yield results that clash with clearly recognized, shared international expectations.² The benefits of multi-branch participation in that process are familiar: it may help form or strengthen a national consensus; it may also lessen the likelihood of unpopular policies.³ But a nation with more than one governmental hand at the foreign policy helm can incur international costs in credibility. The hand that signs is not the hand that delivers; what looks like a good bargain to diplomats at the negotiating table may look altogether different to legislators in the cold light of constituents' mail.

The tension between these values is particularly evident in the making of treaties by the United States, which can be done only with the approval of two-thirds of the Senate. This paper explores some of the issues created by this value tension, which is reflected in the making, interpretation, and termination of international agreements. It begins with a brief examination of the source of the Senate's constitutional power to condition its consent to treaties and the origins of recent changes in that process.

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1. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 507 (Jonathan Elliot ed., 2d ed. 1863).

2. See generally Warren Christopher, *Ceasefire Between the Branches: A Compact in Foreign Affairs*, 60 FOREIGN AFF. 989 (1982); John G. Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 FOREIGN AFF. 229 (1981/1982).

3. See generally THOMAS M. FRANCK & EDWARD WEISBAND, *FOREIGN POLICY BY CONGRESS* (1979); Douglas J. Bennet, Jr., *Congress in Foreign Policy: Who Needs It?*, 57 FOREIGN AFF. 40 (1978).

I. CONDITIONING SENATE CONSENT TO TREATIES

The text of the Constitution says nothing concerning the authority of the Senate to condition its consent to treaties.⁴ In this respect the treaty power is identical to the appointment power: as with treaties, the constitutional text requires the advice and consent of the Senate for appointments, but is silent concerning the Senate's power to condition its consent to appointments. Yet it is now well settled that the Senate lacks power to condition its consent to appointments but can condition its consent to treaties.⁵ Why?

The answer lies in constitutional custom. Chief Justice William Howard Taft said: "So strong is the influence of custom that it seems almost to amend the Constitution."⁶ The Senate's power to condition its consent to treaties dates from Senate approval of the Jay Treaty, with reservations, in 1798. That power, the Senate Foreign Relations Committee noted, is part of customary constitutional law in the United States.⁷

Recently, concern has arisen in the Senate about the continued viability of that power. In response, the Senate has effectively revised the method by which it conditions its consent to treaties. A bit of background may illuminate the sources of that concern and help explain the new approach.

Following the Senate's consent in 1976 to the Treaty of Friendship and Cooperation with Spain a significant disagreement occurred behind closed doors.⁸ After transmittal of that Treaty to the Senate,⁹ the Foreign Relations Committee (hereinafter alternatively referred to as the "Committee") held hearings on the international agreement. These hearings revealed Senate concerns about Spanish progress towards democracy.¹⁰ Consequently, the Committee appended a five-part "declaration" to the

4. The Constitution merely provides that the making of a treaty requires the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2.

5. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW [hereinafter RESTATEMENT (THIRD)] § 303 cmt. d (1986) (stating that the Senate may condition its consent to a treaty, provided the condition has a plausible relation to the treaty's content or implementation); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 133-34 (1972) (stating that the Senate's constitutional right to impose reservations as a condition for consent is universally accepted); 14 MAJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 138 (1970); Margaret A. Rague, Note, *The Reservation Power and the Connally Amendment*, 11 N.Y.U. J. INT'L L. & POL. 323, 327 (1978) (tracing the Senate practice of adding reservations to treaties to the Jay Treaty).

6. LOUIS FISHER, PRESIDENT AND CONGRESS 36 (1972).

7. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON EXEC. N, S. REP. NO. 12, 95th Cong., 1st Sess. 11 (1978).

8. Treaty of Friendship and Cooperation, Jan. 24, 1976, U.S.-Spain, 27 U.S.T. 3005.

9. S. EXEC. DOC. E, 94th Cong., 2d Sess. (1976).

10. *Spanish Base Treaty: Hearings on Executive E Before the Senate Comm. on Foreign Relations*, 94th Cong., 2d Sess. (1976).

resolution of ratification it reported,¹¹ stating that the Senate "hopes and intends that this Treaty will serve to support and foster Spain's progress toward free institutions . . ."¹² The Senate later approved the resolution of ratification as reported by the Committee.¹³

Several weeks thereafter, the Department of State reported strong opposition within the Cortes (the Spanish parliament) to the Senate declaration, and indicated to the Senate Foreign Relations Committee that the Government of Spain would not ratify the Treaty were the Senate declaration included in the U.S. instrument of ratification. During consultation with various members of the Committee, the State Department proposed inclusion of the declaration in an annex to the Treaty, to be incorporated by reference in the instrument of ratification and transmitted simultaneously.¹⁴ "Attaching the Senate resolution to the instrument by means of an annex referred to in the instrument of ratification," the Department said, "is the equivalent of incorporating the resolution in the instrument."¹⁵ The Senators approved, and the Treaty was ratified by the President.

It was with fresh memories of this episode that the Senate Foreign Relations Committee took up the Panama Canal Treaties.¹⁶ The Committee appended to each resolution of ratification an "understanding" that "[t]he President shall include all amendments, reservations, understandings, declarations, and other statements incorporated by the Senate in its resolution of ratification . . . in the instrument of ratification exchanged with the Government of the Republic of Panama."¹⁷ The concern in the Senate that the material it had added might be transmitted separately from the instrument of ratification was understandable: the requirements of international law concerning treaty ratification, in light of United States ratification practice, raise serious doubts whether a separately transmitted Senate condition would be binding on the other party.

11. S. EXEC. REP. NO. 25, 94th Cong., 2d Sess. 6 (1976).

12. *Id.*

13. S. Res. 401, 94th Cong., 2d Sess. 6 (1976); *see also* 122 CONG. REC. 19,390 (1976) (ratification vote).

14. For a general discussion of the diplomatic *contretemps*, see Theodor Meron, *The Treaty Power: The International Legal Effect of Changes in Obligations Initiated by the Congress*, in *THE TETHERED PRESIDENCY* 103 (Thomas M. Franck ed., 1981); *Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. pt. v., at 122-23 (1978) [hereinafter *Panama Canal Hearings*].

15. Letter from Robert J. McCloskey, Assistant Secretary of State for Congressional Relations, to John J. Sparkman, Senate Foreign Relations Committee Chairman (undated) (on file with the author).

16. *See* S. EXEC. REP. NO. 12, 95th Cong., 2d Sess. 10-11 (1978) (alluding to concern over the Spanish Treaty incident).

17. *Id.* at 10.

International law, at least as interpreted by the United States Government, requires that all reservations and other terms and conditions attached to a nation's ratification of a treaty be formulated in writing and communicated to the other party or parties to the treaty.¹⁸ Traditionally, the United States has communicated such Senate conditions as a part of the instrument of ratification,¹⁹ and it was thought that other nations might rely on this practice. Given the requirement that the President make the Senate's qualifications on consent effective if he wishes to bring the treaty into force,²⁰ it seemed sensible to the Senate that its conditions, or at least some of its conditions, be incorporated in the instrument of ratification.²¹

The Senate Foreign Relations Committee formally codified these considerations in its resolution of ratification concerning the SALT II Treaty.²² The resolution dispensed with the outmoded lexicon of ratification law and, instead of using such labels as "amendments," "reservations," and "understandings," it set forth three explicit categories of conditions: (1) those that need not be formally communicated to or agreed to by the Soviet Union; (2) those to be formally communicated to the Soviet Union, but need not necessarily be agreed to by it; and (3) those that would require the explicit agreement of the Soviet Union.²³ This tripartite structure, the Committee noted, "should avoid

18. See, e.g., Letter from Douglas J. Bennet, Jr., Assistant Secretary of State for Congressional Relations, to John J. Sparkman, Chairman of the Senate Foreign Relations Committee (Jan. 26, 1978), in *Panama Canal Hearings*, *supra* note 14, at 49.

19. See Letter from Herbert J. Hansell, Legal Adviser to the Department of State, to Michael J. Glennon, Legal Counsel to the Senate Foreign Relations Committee (June 8, 1979), in 2 UNITED STATES FOREIGN RELATIONS LAW 199 (Michael Glennon & Thomas Franck eds., 1980) [hereinafter FOREIGN RELATIONS LAW].

20. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 133 cmt. c (1965); RESTATEMENT (THIRD), *supra* note 5, § 314 cmt. b.

21. See WHITEMAN, *supra* note 5, at 138-39. See also Memorandum from the Office of the Legal Adviser of the Department of State to J. W. Fulbright, Chairman of the Senate Foreign Relations Committee (Mar. 22, 1971), in S. EXEC. REP. NO. 5, 93d Cong., 1st Sess. 15-16 (1973):

In United States law a condition placed by the Senate on its approval of a treaty—whether by reservation or by understanding—and included by the President in the instrument of ratification takes effect as domestic law along with the treaty itself. This is a necessary result of the shared constitutional role of the President and the Senate in the treaty-making process.

An instrument of ratification or adherence executed by the President of the United States sets forth the text of the reservation, understanding, or other instrument as given in the Senate resolution. . . .

Reservations, understandings, or declarations of intent or interpretation, in order to have international effect, are incorporated in the case of a bilateral treaty. . . .

22. S. EXEC. REP. NO. 14, 96th Cong., 1st Sess. 72-78 (1979).

23. *Id.* The committee's chairman, Senator Frank Church, and ranking minority member, Senator Jacob Javits, previously had received assurances in an exchange of letters with Secretary of State Cyrus Vance that the President would respect the Senate's wishes on this matter, as expressed in the resolution. *Id.* at 31-32.

the ambiguities and potential misunderstandings inherent in the traditional designation.”²⁴ It continued:

Those designations may still be useful as indicators of a sponsor’s intent. But as to whether Soviet involvement is required either through formal notice or agreement, the designations themselves would not have to carry the entire weight of indicating the Senate’s intentions. Placement in a particular section of the Resolution of Ratification should leave no doubt on this score.²⁵

The new terminology appears to have stuck. During Senate consideration of the INF Treaty and the CFE Treaty, “condition” seemed to supplant entirely the old labels of “reservation” and “understanding.”²⁶ So, too, did the three categories of conditions.

II. THE SENATE’S POWER TO REQUIRE PRESIDENTIAL TRANSMITTAL

Section 314 of the *Restatement*, concerning reservations and understandings, provides as follows:

(1) When the Senate of the United States gives its advice and consent to a treaty on condition that the United States enter a reservation, the President, if he makes the treaty, must include the reservation in the instrument of ratification or accession, or otherwise manifest that the adherence of the United States is subject to the reservation.

(2) When the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate’s understanding.²⁷

Comment b recognizes that the President “must give effect to conditions imposed by the Senate on its consent.”²⁸ It notes, accordingly, that the President:

... generally includes a verbatim recitation of any proposed reservation, statement of understanding, or other declaration relevant to the application or interpretation of the treaty contained in the Senate resolution of consent, both in the instrument notifying the other state or the depositary of United States ratification or accession and in the proclamation of the treaty.²⁹

Without explanation or elaboration, however, the comment then states flatly that “[t]he President may also communicate a Senate qualification

24. *Id.* at 35.

25. *Id.*

26. See generally EXEC. REP. NO. 100-15, 100th Cong., 1st Sess. (1988) (INF Treaty).

27. RESTATEMENT (THIRD), *supra* note 5, § 314.

28. *Id.* § 314, cmt. b.

29. *Id.*

separately."³⁰

The *Restatement* seems mistaken in permitting such discretion. An absolute requirement of inclusion in the instrument of ratification is appropriate to ensure identical expectations by both nations concerning rights and obligations imposed by the treaty. Transmission of material included by the Senate in its resolution of ratification by means of an "annex" not incorporated by reference or a diplomatic note only increases the possibility of misunderstanding. This applies even more to provisions that expressly or implicitly alter provisions of a treaty.

If broader presidential discretion is to be recognized, however, it should be limited to the authority to exclude from the instrument of ratification only material added by the Senate that in the Senate's view does not represent a "condition" to its consent to the international obligations undertaken in the treaty. The President may have the power to transmit separately from the instrument of ratification a "statement" or "declaration" merely expressing the sense of the Senate and not altering international rights or obligations under the treaty. Such authority would arguably derive from the President's power as "sole organ of the United States"³¹ for the purpose of communicating with foreign governments, a power long recognized by the Senate.³² The *Restatement* maintains that the Senate cannot condition its consent to a treaty upon the firing of a cabinet officer,³³ presumably on the notion that dismissal is a plenary presidential power; the same might be said of the power to communicate with foreign governments³⁴ or to negotiate treaties.³⁵ Because conditions have the same force domestically and internationally as the text of the

30. *Id.*

31. See *infra* note 34.

32. See, e.g., S. EXEC. REP. NO. 12, *supra* note 16, at 9-10. The President's power in this regard seems settled. "As 'sole organ,'" Professor Henkin has written, "the President determines . . . how, when, where and by whom the United States should make or receive communications, and there is nothing to suggest that he is limited to time, place, or forum." HENKIN, *supra* note 5, at 47.

33. RESTATEMENT (THIRD), *supra* note 5, § 303, cmt. d.

34. But see MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 3-34 (1991) (discussing the limits of that power). See also Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577, 590 (1980).

35. Pursuant to its "advice" power, the Senate clearly can express its sense as to what sort of agreement it wishes the Executive to negotiate or not to negotiate. In considering the INF Treaty, for example, the Senate adopted a declaration that, in any subsequent agreement, it "should" be the position of the United States that no restrictions "should" be established on certain cruise missiles. 134 CONG. REC. S6615 (daily ed. May 25, 1988). While the President may disregard this admonition, he does so at his peril. The Senate cannot, however, bind the President with respect to future negotiations. During that same debate, Sen. Jesse Helms offered an amendment, rejected by the Senate, providing that the United States "shall" be guided by certain principles and considerations in continued negotiations with the Soviet Union. 134 CONG. REC. S6785 (daily ed. May 26, 1988). Such a restriction, as Sen. Alan Cranston pointed out, would have been unconstitutional. *Id.* at S6787.

treaty,³⁶ it follows that the same principles apply to the treaty text. The President and the Senate could not, for example, approve a treaty prohibiting a future President from negotiating another treaty on a given subject. As submitted to the Senate, the Panama Canal Treaty did precisely that, prohibiting the United States from negotiating with third states concerning the construction of another canal.³⁷ The Foreign Relations Committee recommended, and the Senate adopted, an understanding "to make clear that the provision may not be construed as precluding a future President from exercising his constitutional power to confer with other governments."³⁸ (The purpose of the treaty provision, the Committee believed, was to "ensure that the United States not . . . enter into" such an agreement.³⁹)

Still, the difficulty with discretion so broad is that it either would cause presidential power to turn on an empty semantic distinction or would make the President the sole judge of the Senate's substantive intent. It is established that the legal effect of any matter added by the Senate depends upon its substance, not its denomination.⁴⁰ But the President, if given this broad latitude, would be empowered to exclude from the instrument of ratification material intended by the Senate to be included⁴¹ and, conversely, would be required to include material that the Senate might not have intended to be transmitted.⁴² The alternative—allowing the President to look to the substance of the added material—creates equally great difficulties in that it increases executive discretion to

36. RESTATEMENT (THIRD), *supra* note 5, § 314, cmt. b.

37. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, U.S.-Pan., art. XII(2), subpar. (b), T.I.A.S. No. 10,029.

38. EXEC. REPT. 12, 95th Cong., 2d Sess. 9 (1978).

39. *Id.* [emphasis in original].

40. WHITEMAN, *supra* note 5, at 140.

41. See Chapter Seven, GLENNON, *supra* note 34.

42. The so-called Niagara Reservation could be viewed as such a condition. In 1950, the United States and Canada reached an agreement governing the use of the Niagara River, designed to protect the scenic beauty of Niagara Falls and to allow diversion of waters from the river for generation of hydroelectric power. Convention on Uses of the Waters of the Niagara River, Feb. 27, 1950, U.S. Can., 1 U.S.T. 694. The Senate, uncertain as to how the American share of the waters should be utilized, adopted a "reservation" to the treaty providing that the question would be resolved by an act of Congress, and that the water would not be utilized in the interim. The Government of Canada accepted the reservation, and the treaty entered into force. Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151, 1155-58 (1956). Congress then failed to take action on the issue over the next 5 years, a delay that proved too much for "the energetic Mr. [Robert] Moses of the New York Power Authority," who brought suit to have the reservation declared null and to have a license for hydroelectric development issued to the authority. *Id.* at 1159. The United States Court of Appeals for the District of Columbia Circuit held that the reservation was not really part of the treaty, as it dealt with a matter of purely domestic concern, and therefore was not legally enforceable; the Supreme Court, however, vacated the Appeals Court's judgment. *Power Auth. of N.Y. v. Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir.), *vacated as moot sub nom.* *American Pub. Power Ass'n v. Power Auth. of N.Y.*, 355 U.S. 64 (1957).

the point of authorizing the separate transmittal of material that in the President's exclusive judgment was falsely labeled a "reservation," a formulation of authority that would not comport with traditional United States ratification practice.⁴³ The better view is thus that the President is required to communicate a Senate condition as a part of the instrument of ratification—unless, of course, the Senate expressly waives the requirement.

Regardless of the position taken by the *Restatement* on the scope of presidential authority in the face of Senate "silence," it nonetheless ought to be clear that presidential discretion is diminished if the Senate consents to a treaty on the express condition that specified material be transmitted with the instrument of ratification, as it did—without objection by the executive branch—in approving the Panama Canal Treaties.⁴⁴ Such a condition (subject to the possible implication of the President's "communication" power)⁴⁵ would rest upon approximately the same constitutional footing as a condition providing that the Senate or Congress participate in the termination process.⁴⁶ If the Senate can validly accomplish the latter by conditioning its consent to a treaty, as the *Restatement* concludes it "presumably" can,⁴⁷ then presumably it can accomplish the former as well. Each condition would be "applicable to the treaty before it" and have a "plausible relation to its adoption."⁴⁸

III. EFFECT OF SENATE CONDITIONS

The effect of the inclusion of Senate conditions in the United States instrument of ratification depends on the response of the other signatory.

43. See WHITEMAN, *supra* note 5, at 138-39.

44. See Chapter Seven, GLENNON, *supra* note 34.

45. See *supra* note 34.

46. The question whether the Senate may condition its consent to a treaty by prescribing the procedure the President must follow in terminating it gave rise to considerable controversy in the aftermath of President Carter's unilateral termination effective January 1, 1980, of the Mutual Defense Treaty between the United States and the Nationalist Chinese on Taiwan (Treaty of Mutual Defense, Dec. 2-10, 1954, U.S.-China, 6 U.S.T. 433). The Department of Justice, relying upon the President's position as the nation's "sole representative in foreign affairs," argued that the President alone can determine whether a treaty should be terminated. The Department cited in support the dictum of Justice Sutherland in *Curtiss-Wright*, 299 U.S. at 319, that the President is the "sole organ" of the United States in foreign policy. The Senate Foreign Relations Committee did not accept this view, believing that either the Senate acting alone (by attaching a condition to a treaty) or the Congress as a whole (by statute) could constitutionally limit the President's authority to terminate a treaty. The committee based its reasoning on the separation of powers analysis in Justice Jackson's concurring opinion in the *Steel Seizure Case*. The American Law Institute supports the Senate's position in RESTATEMENT (THIRD), *supra* note 5, § 339, cmt. a. See generally Michael J. Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy*, 52 U. CIN. L. REV. 84 (1983).

47. RESTATEMENT (THIRD), *supra* note 5, § 339 cmt. a.

48. *Id.* § 339 reporters' note 3.

The United States is effectively placed in the position of making a "counteroffer."⁴⁹ United States practice is, accordingly, to place the other signatory on notice of such conditions prior to the exchange of instruments of ratification.⁵⁰ Refusal of the other state to exchange instruments of ratification constitutes rejection of the treaty.⁵¹ Under such circumstances, the treaty and the Senate's conditions are therefore without effect, both domestically and internationally. If, on the other hand, the other signatory expressly accepts the Senate's conditions upon exchange of the instruments of ratification, both the text of the treaty and the Senate's conditions take effect internationally and, if the treaty is self-executing, become the law of the land.⁵²

Is the other signatory to the treaty, upon exchanging instruments of ratification with United States representatives, nonetheless bound by those conditions if it makes no comment regarding the Senate's conditions? That question gave rise to disagreement during consideration of the SALT II Treaty by the Senate Foreign Relations Committee. I advised the Committee that "[i]f the Soviet Union proceeds with the exchange of instruments of ratification its silence constitutes assent to the treaties as modified by the United States."⁵³ Eugene V. Rostow,⁵⁴ however, sharply disagreed in testimony before the Committee⁵⁵ and in a subsequent letter.⁵⁶ "[A] reservation has the same legal effect as a letter from my mother," he said.⁵⁷ Elaborating, Professor Rostow suggested that an amendment to the text of a treaty is of greater legal force than a

49. See, e.g., T. O. ELIAS, *THE MODERN LAW OF TREATIES* 28-29 (1974).

50. WHITEMAN, *supra* note 5, at 138.

51. ELIAS, *supra* note 49, at 28-29; WHITEMAN, *supra* note 5, at 140-41.

52. As the "supreme law of the land," U.S. treaties enjoy equal status with federal statutes. U.S. CONST. art. VI, cl. 2. The Supreme Court has held, however, that insofar as a treaty is a contract, its duties must be carried out by a political branch of the Government and not by the judiciary. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Thus, treaty terms requiring legislative action are not enforced by the courts until Congress has enacted the appropriate legislation.

There is some controversy as to whether a treaty becomes law for domestic purposes on the date it enters into force or on the date the President formally proclaims it. *RESTATEMENT (THIRD)*, *supra* note 5, § 312 reporter's note 4. The question is of minor importance, as Presidents are generally swift to issue such proclamations. See *id.* § 312 cmt k.

53. Memorandum from Michael J. Glennon and Frederick S. Tipson to members of the Senate Foreign Relations Committee (June 25, 1979), in *SALT II Treaty: Hearings on Ex. Y Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. pt. 4, at 23 (1979) [hereinafter *SALT II Hearings*].

54. Professor Rostow appeared as chairman of the Committee on the Present Danger, a group opposed to ratification of the *SALT II Treaty*. *Id.* at 1.

55. *SALT II Hearings*, *supra* note 53, at 14-15.

56. *Id.* at 15-17. The letter was also signed by Professor Rostow's Yale Law School colleagues, Joseph W. Bishop, Robert H. Bork, Leon Lipson, Myres S. McDougal, and William M. Reisman.

57. *Id.* at 13; see also *SALT II Treaty: Hearings on Ex. Y. Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess., pt. 2, at 393-94 (1979) [hereinafter *Salt II Hearings*].

reservation,⁵⁸ and that, in any event, "silence would not be acceptance."⁵⁹

Rostow seemed mistaken in his conclusion that the legal effect of treaty reservations is different from that of amendments. "If a treaty is ratified or acceded to by the United States with a reservation effective . . . , the reservation is part of the treaty and is law of the United States."⁶⁰ Rostow's error may have derived from the confusing interface between principles of domestic ratification law and those of international law. In domestic law, the Senate may condition its consent to treaties in either of two ways. It may amend its resolution of ratification by adding material (normally called a reservation, understanding, interpretation, declaration, or statement), or it may amend the resolution of ratification by inserting a condition that the text of the treaty be amended. Strictly speaking, the Senate does not "amend" the treaty text; it consents to ratification by the President on the condition that the President amend the text upon ratification.⁶¹ Each form of alteration is equally binding on the President, however, if he chooses to exchange instruments of ratification.⁶² International law, similarly, regards a reservation to a bilateral treaty as tantamount to a proposed amendment.⁶³ The principal reason

58. Professor Rostow engaged in the following colloquy with Senator Joseph Biden:

Senator BIDEN. If the reservation is adopted by the U.S. Senate, and the Soviets go forward with the treaty accepting our stated interpretation—

Mr. ROSTOW. That is the same drama we had in 1972. That is exactly the problem of the unilateral interpretations in 1972, which were sold to you and the Senate as grounds for abrogating the treaty. The Soviets paid no attention to our unilateral interpretations, and we did nothing about it when they were violated.

Senator BIDEN. I am told by counsel that a reservation becomes a full part of the treaty. Assume that counsel is right that it does, would you have a problem?

...

Mr. ROSTOW. I made a list of other problems on which we think amendments or reservations are necessary and I certainly should prefer amendments. I am happy to know that your counsel thinks that a reservation becomes part of the treaty, and I will be glad to talk with him about it afterward.

SALT II Hearings, supra note 57, at 393-94.

59. *Salt II Hearings, supra* note 53, at 14.

60. RESTATEMENT (THIRD), *supra* note 5, § 314 cmt. b.

61. *See infra* note 62.

62. As noted above, the label used by the Senate is legally irrelevant. WHITEMAN, *supra* note 5, at 140. Thus, a Senate amendment to its resolution of ratification providing that a given article of the treaty is without force and effect would be every bit as effective as an actual "amendment to the text" of that treaty striking the article in question.

63. The use of the terms "amendment" and "reservation" is thus somewhat confusing. As pointed out above, the Senate cannot itself amend a treaty. Nor can it really enter a reservation; rather, it can impose, as a condition for its advice and consent, the requirement that the President enter a reservation. RESTATEMENT (THIRD), *supra* note 5, § 303 reporter's note 3. In either event, the President must, under international law, return to the other signatory to ask consent to a new treaty. *See id.* at 63-65; *see also* 1 LASSA FRANCIS LAWRENCE OPPENHEIM, INTERNATIONAL LAW 914 (Sir Hersch Lauterpacht ed., 8th ed. 1955) (calling a reservation "the refusal of an offer and the making of a fresh offer"); Clive Parry, *The Law of Treaties*, in MANUAL OF PUBLIC INTERNA-

that the Senate sometimes prefers the "reservation" mode to the "amendment" mode is diplomatic: domestic political considerations in the nonreserving state may make it easier for its government to accept a treaty alteration that is cosmetically less glaring.⁶⁴ Thus the *Restatement* defines "reservation" generically as including any "unilateral statement made by a state when signing, ratifying, accepting, approving, or acceding to an international agreement, whereby it purports to exclude or modify the legal effect of certain provisions of that agreement in their application to that state."⁶⁵

The question whether nonobjection constitutes tacit acceptance of a reservation to a bilateral treaty is more difficult. While tacit acceptance of reservations to multilateral treaties has received considerable attention,⁶⁶ that of reservations to bilateral treaties has not. Principles of contract are analogous. They support the proposition that a reservation to a bilateral treaty puts the reserving state in the position of rejecting the treaty and proposing a counteroffer.⁶⁷ Contract law also provides insight into ancillary questions, such as determining when a counteroffer has been accepted. Principles of contract law would suggest that if the other state proceeds to the affirmative act of exchanging instruments of ratification after having been placed on notice that an alteration is demanded, it has accepted the counteroffer. Because of the dearth of authority among traditional sources of customary international law, however, it cannot be asserted that the matter is free from doubt.

In any event, the question is largely academic because the United

TIONAL LAW 175, 194 (M. Sorensen ed. 1968) (stating flatly that "[a] reservation constitutes a proposal of an amendment of the treaty text").

The Vienna Convention on the Law of Treaties uses the term "reservation" to encompass both types of Senate conditions, providing in Article 2(1)(d) that "'reservation' means a unilateral statement, *however phrased or named*, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 (1969), *reprinted in* 63 AM J. INT'L L. 875 (1969) (emphasis added) [hereinafter Vienna Convention].

64. To cite one example, the Senate Foreign Relations Committee recommended to the Senate that changes to the Panama Canal Treaties other than those recommended by the committee itself not take the form of amendments. S. EXEC. REP. No. 95-12, *supra* note 16, at 13.

65. RESTATEMENT (THIRD), *supra* note 5, § 313 cmt. a.

66. P. Brazil, *Some Reflections on the Vienna Convention on the Law of Treaties*, 6 FED. L. REV. 223 (1975); Jean K. Koh, Comment, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71 (1982); *see generally* Vienna Convention, *supra* note 63. While section 2 of the Vienna Convention is entitled simply "Reservations"—a shortening of the title "Reservations to Multilateral Treaties" used in an earlier draft—the President of the Vienna Conference, Professor Ago, said that the change should be understood as reflecting the fact that all reservations are, by definition, to multilateral treaties, since, strictly speaking, a so-called reservation to a bilateral treaty constitutes a proposal for a new treaty and not a true reservation at all. Brazil, *supra*, at 230-31.

67. *See, e.g.,* Parry, *supra* note 63, at 194.

States generally obtains the express acceptance of Senate conditions by the other party, at least with respect to major bilateral treaties. Both sides normally sign a protocol of exchange of the instruments of ratification, which spells out the legal effect to be accorded all material in those instruments and thus effectively binds each party explicitly to any conditions entered by the other.⁶⁸

The practice of executing a protocol of exchange, up until now a relatively obscure stage in the process of treaty ratification, can be expected to gain greater prominence as attention focuses increasingly on the need for clarity and precision in treaty commitments. The evolution of the practice was hastened greatly during the Senate's consideration of the Panama Canal Treaties⁶⁹ and the SALT II Treaty.⁷⁰ As noted above, a condition added to the so-called Panama Canal Neutrality Treaty required, apparently for the first time, that a protocol of exchange be executed and that it include a particular condition.⁷¹ Curiously, however, the "inclusion" requirement applied only to that one condition, and not to other material added by the Senate to the instrument of ratification.⁷²

Another question concerns the validity of Senate conditions that would place the United States in violation of international law. It has been contended that a condition that violates international law is unconstitutional. Although the argument focuses most directly on the power of the Senate to condition its consent, the objection necessarily applies to the original treaty text as well. That is, if the Senate is constitutionally precluded from insisting that the treaty be changed in a manner that would breach international law, the same matter, included by the President in the treaty transmitted for Senate approval, should also be constitutionally objectionable.

The theory is unsupported by anything in the constitutional text. No court has ever adopted it. The *Niagara Reservation Case*⁷³ did not hold that the Senate condition in question was invalid under international law, as acknowledged by the theory's proponents.

Doctrinally, the starting point is the well-settled last-in-time doc-

68. See S. EXEC. REP. NO. 14, *supra* note 22; RESTATEMENT (THIRD), *supra* note 5, § 314 cmt. b; WHITEMAN, *supra* note 5, at 139. See generally *id.* at 138.

69. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, U.S.-Pan., 33 U.S.T. 1; Treaty on the Panama Canal, Sept. 7, 1977, U.S.-Pan., 33 U.S.T. 39.

70. S. EXEC. DOC. Y, 96th Cong., 1st Sess. (1979).

71. See 124 CONG. REC. 7,187 (1978).

72. Senate Additions to the Panama Canal Treaties, DEP'T ST. BULL. No. 2014, May 1978, at 52, 53.

73. *Power Auth. of N.Y. v. Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir.), *vacated sub nom. American Pub. Power Ass'n v. Power Auth. of N.Y.*, 355 U.S. 64 (1957) and remanded.

trine—the principle that the most recent expression of the law-maker's will controls. The principle applies with respect to statutes and also with respect to treaties. The two are interchangeable for last-in-time purposes. Whether a treaty subsequent in time to a statute—or another treaty—violates international law is thus, for domestic legal purposes, irrelevant.⁷⁴

Accordingly, if the United States and Japan entered into a treaty permitting the export of raw ivory from the United States to Japan, the treaty would violate pre-existing international obligations of the United States (set forth in the Convention on International Trade in Endangered Species [CITES]).⁷⁵ But no court in the United States would hold the treaty invalid for that reason. Nor would any United States court inquire whether the provision in question was contained in the original treaty text or added as a condition to the Senate's consent. The United States and Japan would be regarded as violators of international law, yet—again, for domestic purposes—that would be seen as their choice.

The CITES norm is of course treaty-based, but it would make no difference if the norm derived from international custom. Suppose, for example, that customary international law were regarded as requiring prompt, adequate and effective compensation for expropriated property, and suppose that the United States and Azerbaijan entered into a treaty providing that that norm would not apply when property belonging to nationals of the other is expropriated. Would a United States court find the treaty invalid because it violates international law? Of course not: this is how international law evolves. If enough states adopt the new rule, the old customary norm dissolves and a new one emerges. In the meantime, the United States and Azerbaijan may be international law violators, but no court in the United States would decline to enforce the treaty for that reason—whether it read as it did because the provision was included as a result of action by the Senate or by the original treaty's negotiators.

Nor would it matter *constitutionally* whether the treaty was seen as invalid internationally because it violated peremptory norms. Under those circumstances, *no treaty would exist* with respect to the United States. The “treaty” would not be enforced by the courts, not because it is unconstitutional, but because the treaty simply is not in force with respect to the United States. The same conclusion would obtain in other instances where principles of international law render a treaty ineffectual,

74. See, e.g., *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972).

75. Convention on International Trade in Endangered Species, Mar. 3, 1973, 27 U.S.T 1087, 12 I.L.M. 1085. See generally Michael J. Glennon, *Has International Law Failed the Elephant?*, 80 AM. J. INT'L L. 1 (1990).

such as those precluding a state from becoming a party subject to a reservation that defeats the object and purpose of the treaty. As between the Netherlands and the United States, the Genocide Convention⁷⁶ is not in force—not because the Senate's condition is invalid constitutionally, but because, as between those two states, the treaty has no force internationally.⁷⁷ Nothing exists to constitute "law of the land."

There is, in short, no basis for the argument that the Senate is constitutionally disabled from adding a reservation that violates international law. The standard adopted by the *Restatement's* reporters is correct: "[A] condition having plausible relation to the treaty, or to its adoption or implementation, is presumably not improper, and if the President proceeds to make the treaty he is bound by the condition."⁷⁸

IV. THE FORM OF THE SENATE'S CONDITION

Does the Constitution require that, if the Senate wishes to condition its consent to a treaty, it do so in a particular manner? Specifically, must a condition be express, or can it be implied?

There is little reason to believe that this issue should be resolved differently from any other issue of statutory construction when the question presented is the breadth of presidential power under the law in question. It is commonly accepted that executive authority can be limited expressly or implicitly. In *Little v. Barreme*,⁷⁹ for example, the Court inferred a congressional prohibition against the seizure of a certain class of naval vessels from a statutory authorization to seize another class of naval vessels. In the *Steel Seizure Case*,⁸⁰ to cite another example, Justice Black inferred congressional disapproval of a presidential act (President Truman's seizure of the steel mills during the Korean War) from the absence of congressional approval; Justice Frankfurter inferred it from the rejection of approval; and Justice Jackson inferred it from the silence of Congress concerning seizure in the face of congressional approval of other means of resolving labor-management disputes. So there is nothing novel in the notion that Congress can enact implied limitations on presi-

76. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

77. The Netherlands and nine other states have objected to the United States reservations to the Convention. U.N. SECRETARIAT, MULTILATERAL TREATIES DEPOSITED WITH SECRETARY-GENERAL, at 102-103, U.N. Doc. ST/LEG/Ser. E/8, U.N. Sales No. E.90.V.6 (1989) (Status as of Dec. 31, 1989).

78. RESTATEMENT (THIRD), *supra* note 5, § 339 reporter's note 3.

79. 6 U.S. (2 Cranch) 170 (1804).

80. 343 U.S. 579 (1952).

dential power, and nothing in the Constitution that requires Congress to limit presidential power expressly.

There is no reason to believe that different principles of construction should apply with respect to treaties. The issue arose in connection with the dispute over interpretation of the ABM Treaty. The Senate addressed the issue in Senate Resolution 167, which provided that

the understanding of the Senate is manifested by any formal expression of understanding by the Senate, as well as by other evidence of what the Senate understood the treaty to mean, including Senate approval or acceptance of, or Senate acquiescence in, interpretations of the treaty by the executive branch communicated to the Senate⁸¹

Conditions imposed by the Senate may thus be explicit—as they are when formally reduced to express reservations, understandings, or other statements, or they may be implicit (just to maintain consistency in the sentence)—as they were in the case of the ABM Treaty, where their content is to be gleaned from statements by Senators and by administration representatives in which the Senators present acquiesced. The form of the Senate's understanding of a treaty's meaning is constitutionally irrelevant; it is substance that controls. As Professor Louis Henkin testified before the Committee:

The President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave its consent. That is indisputable when the Senate has made its understanding plain in the form of a proposed reservation or explicit understanding. The same principle governs when the Senate's understanding of a treaty provision is not expressed in a formal resolution, but is apparent from the Senate's deliberations leading to its expression of consent.

The Senate's understanding of the treaty to which it consents is binding on the President. He can make the treaty only as so understood. He cannot make the treaty and insist that it means something else.⁸²

Professor Henkin addressed directly the question whether the Senate is required to "formalize" its understanding of a treaty's meaning. He said:

I do not think the formality of a reservation or understanding by the Senate is a constitutional requirement. The Constitution says nothing of the kind.

[I think] what the Constitution clearly implies is that [it is] what the Senate understands the treaty to mean, [that that] is what the treaty means for purposes of its consent.⁸³

81. S. Res. 167, 100th Cong., 1st Sess. (1987), reprinted in *The ABM Treaty and the Constitution: Joint Hearings Before the Senate Committee on Foreign Relations and the Senate Committee of the Judiciary*, *infra* note 87, at 229-42.

82. *Id.* at 82.

83. *Id.* at 88.

It therefore seems entirely sensible to believe, as Senate Resolution 167 indicated, then that if the Senate proceeds to approve a treaty based on a certain understanding, then that understanding controls.⁸⁴ This is the rule of section 314 of the *Restatement* which imposes no requirement that the Senate's understanding be reduced to a formal condition. It is reiterated in comment d.⁸⁵ A contrary rule would seem illogical: the reason that the understanding in question is not reduced to a formal condition is that the Senate considers the meaning of the treaty obvious; formal conditions are appropriate where the meaning is not obvious. The Reagan Administration's position would have required that the Senate clarify—indeed, clarify formally, through an explicit condition to its consent—precisely what it is that the Senate views as *beyond* reasonable disagreement. Normally, of course, the Senate conditions its consent to a treaty for the purpose of making some change in the treaty; there is no reason for the Senate to condition its consent to a treaty when it believes that the treaty's meaning is clear.

V. INTERNATIONAL VERSUS MUNICIPAL TREATY OBLIGATIONS

Another issue that arose in connection with the ABM Treaty interpretation dispute was whether there is a difference between the extent to which the executive is municipally bound by the qualification and the extent to which the executive is bound internationally. The Reagan Administration argued to the Senate that United States and Soviet negotiators had a meeting of the minds in 1972, and that the meaning of the

84. Professor Philip Trimble has presented a subtle analysis of the issue arguing that no meaning of a treaty (or law or contract) is forever fixed, but can be changed through presidential initiative and Senate acquiescence. See Philip R. Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists*, 137 U. PA. L. REV. 1461, 1467 (1989). First, the approach relied upon finds Senate acquiescence through a method of inferential reasoning that seems troubling. Professor Trimble would require the Congress to reflect its non-acquiescence through its legislative or appropriations power—necessarily by a two-thirds vote, over the President's veto. Second, Professor Trimble seems to argue that Congress can be deemed to intend the opposite of any measure that is merely *introduced* if only that measure is not approved. This raises serious questions under the principles of democratic theory that Professors Abbott and Riesenfeld discuss: why should only *one* member of the Senate be able, in effect, to control the entire Senate's intent? Third, if a shared understanding *does* exist between the President and the Senate at the time of the latter's consent to a treaty, it is hard to see how violation can have the same effect as amendment. To disregard the "entrenched," original meaning of a law or treaty merely because a later Senate or Congress declines actively to object to violation—which is, after all, not its function—would be to invite presidential lawlessness on a scale foreign to American jurisprudence.

85. RESTATEMENT (THIRD), *supra* note 5, § 314 cmt. d reads:

Although the Senate's resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In that event, the President must decide whether they represent a general understanding by the Senate and, if he finds that they do, must respect them in good faith.

Treaty in force in 1987 was the Treaty on which the negotiators had secretly agreed—not the meaning described to the Senate in 1972 by Administration spokesmen, and not the meaning identified in 1972 by the two Senate opponents of the Treaty as a reason for voting against it.

It is useful to recall that the a state's *domestic* obligations under a given international agreement need not necessarily correspond to its *international* obligations. This principle is clear under customary international law, and is of course true with respect to every nation. Perhaps the best example of an agreement giving rise to disparate obligations within the two different legal systems is an agreement entered into in violation of a state's domestic law. Under international law, such an agreement can be binding internationally notwithstanding the domestic violation. Indeed, such an agreement *is* binding internationally unless the agreement violates a "fundamental rule" of domestic law and that violation is "manifest."⁸⁶ At the same time, the domestic rule is, *ex hypothesi*, contravened. Domestically, such an agreement is thus void; internationally, it is binding.

This is important because, during the dispute concerning interpretation of the ABM Treaty, the State Department Legal Adviser, Abraham Sofaer, repeatedly cautioned the Senate against endorsing a principle that would "[deprive] our nation of the benefits of mutuality-of-obligation in its treaty relations."⁸⁷ "The United States," the Legal Adviser testified, "would be put at a significant disadvantage if the President is subject to stricter constraints, as a result of internal understandings of the Senate, than those which apply to other parties."⁸⁸ It is important, he appeared to suggest, that the Senate not endorse a principle that could result in one obligation for the United States and another for a treaty partner. This argument was repeated during the debate on the INF Treaty.⁸⁹

Surely all nations have a tidiness interest; it behooves a nation that takes law seriously to skirt juridical schizophrenia by not readily permitting itself to undertake dissonant domestic and international obligations. Yet the Legal Adviser seemed wrongly to assume that the possibility of disparity was some novel idea propounded by a few Senators, rather than a contingency inherent in the nature of the relationship between the two

86. See Vienna Convention, *supra* note 63, art. 46, 8 I.L.M. at 697, 63 AM. J. INT'L L. at 890.

87. *The ABM Treaty and the Constitution: Joint Hearings Before the Senate Committee on Foreign Relations and the Senate Committee of the Judiciary*, 100th Cong., 1st Sess. 372 (1987) (statement of Abraham Sofaer, State Dep't Legal Adviser).

88. *Id.*

89. See, e.g., State Dep't Legal Advisor, Abraham Sofaer, Address to the American Law Institute, in 134 CONG. REC. S6724 (daily ed. May 26, 1988) (stating the Administration's belief that "only one treaty can exist, the one to which the Senate gives its advice and consent.") *Id.* at S6742.

legal systems. Moreover, he seemed wrongly to assume that the interest in harmony between the two legal regimes is the *only* interest at stake. Surely a far greater interest is involved: surely the interest of every state—and the United States in particular—in preserving the integrity of the domestic legal order must prevail as against concerns about mere orderliness. The United States Constitution places limits on the President's power. Whatever international law may say about the *international* nature of an obligation undertaken by the United States, those limits apply domestically and must be respected unless Congress legislates to change the obligation. If it does so, that statute would control domestically, although it would not, of course, alter the scope of the United States' international obligation.

VI. EXECUTIVE AUTHORITY TO INTERPRET TREATIES

None of these considerations relate to the power to interpret treaties, which is a separate and distinct issue. In this realm, both domestically and internationally, the executive is supreme. The *Restatement* notes, correctly, that the President has broad authority to construe the words of treaties.⁹⁰ The Senate has no role in the interpretive process.⁹¹ Its role has been seen as confined to the advice-and-consent function conferred by the Constitution.⁹²

Yet it is clear that the President's interpretive power is limited. In approving the INF Treaty,⁹³ the Senate added the so-called "Biden Condition," requiring that the Treaty be interpreted in accordance with the common understanding shared by the President and the Senate at the time of its ratification.⁹⁴ President Reagan gave no indication at the time

90. Section 326(1) of the RESTATEMENT provides that the President "has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states." RESTATEMENT (THIRD), *supra* note 5, § 326(1).

91. *Id.* reporter's note 1.

92. U.S. CONST. art. II, § 2, cl. 2 provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

93. S. EXEC. REP. NO. 100-115, 100th Cong., 2d Sess. (1988).

94. The condition was initiated by Sen. Joseph R. Biden and modified slightly in a technical amendment by Sen. Robert Byrd when the Treaty was approved by the Senate. It provided as follows:

The Senate's advice and consent to ratification of the I.N.F. Treaty is subject to the condition, based on the Treaty Clauses of the Constitution, that:

(1) [T]he United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification;

(2) [S]uch common understanding is based on: (A) First, the text of the Treaty and the provisions of this resolution of ratification; and (B) Second, the authoritative representations which were provided by the President and his representatives to the Senate and its

of its consideration that he might elect to disregard it. Nonetheless, following his ratification of the Treaty in Moscow, he seemed to imply that he would not be bound by it. He said:

[A] condition in a resolution to ratification can [not] alter the allocation of rights and duties under the Constitution, nor could I, consistent with my oath of office, accept any diminution claimed to be effected by such a condition in the constitutional powers and responsibilities of the Presidency.⁹⁵

Shortly afterwards, the *Wall Street Journal*⁹⁶ and Heritage Foundation⁹⁷ launched a critique of the Biden Condition. Their analysis misapprehended the substance of the Condition as thoroughly as it did the requirements of the Constitution.

The Condition was merely a rule of interpretation, governing how the INF Treaty is to be construed as domestic law. The Condition provides, as Senate Resolution 167 provided, that the treaty means what the President tells the Senate it means. If this principle seems self-evident, it is, and has been for nearly 200 years—until the Reagan Administration asserted that a President can claim that a treaty means something altogether different than what his representatives told the Senate when it was approved.

The argument for such presidential authority apparently rests upon the claim that “the President alone has the right to determine U.S. international treaty obligations.”⁹⁸ This would have confused the Framers, who seemed to express themselves clearly on the issue: the Constitution provides that “the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”⁹⁹ Pursuant to this shared power, the Senate since the earliest days of the Republic has conditioned its consent to treaties. It often approves ratification subject to the condition that the Presi-

Committees, in seeking Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; and

(3) [T]he United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute; and

(4) [I]f, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph (2), that provision shall be interpreted in accordance with applicable United States law.

134 CONG. REC. S6724 (daily ed. May 26, 1988). The condition was adopted by the Senate by a vote of 72 to 27. *Id.* at S6783-84.

95. 134 CONG. REC. S7664 (daily ed. June 13, 1988).

96. *Sofaer's Revenge*, WALL ST. J., June 15, 1988 at 24.

97. David B. Rivkin, Jr., *GOP Must Share Blame for Byrd Amendment*, *id.*

98. *Id.*

99. U.S. CONST. art. II, § 2, cl. 2.

dent change the treaty in one way or another. No President has ever challenged the Senate's power to do so; as the Foreign Relations Committee has said, that power has become part of "customary constitutional law" in the United States.¹⁰⁰

The Senate well might have insisted that the INF Treaty actually be changed. Instead, the Senate chose a more restrained course; one that did not endanger the Treaty's ratification. It conditioned its consent upon adherence to a canon of construction tailored to this specific agreement.¹⁰¹ Rather than inject the Senate into the process of interpretation that occurs after the Senate's consent, therefore, the Condition simply shaped the meaning of the document to which the Senate consented. The President remains free, as he is with all other treaties, to interpret the INF Treaty to which the Senate consented. But he cannot interpret a treaty other than the one to which the Senate consented—subject to the Biden Condition—for to do so would be to make a new treaty.¹⁰²

The President was bound, therefore, upon bringing the INF Treaty into force, to give effect to the Senate's Condition. "[A] condition having plausible relation to the treaty, or to its adoption or implementation, is presumably not improper, and if the President proceeds to make the treaty he is bound by the condition."¹⁰³ If the President doubted the validity of a Senate-added condition, he "would then have to decide whether he could assume that the Senate would have given its consent without the condition."¹⁰⁴ He could not assume that the Senate would have consented to the INF Treaty without the Biden Condition. That the Condition was just that—a condition on which the Senate based its ap-

100. S. EXEC. REP. NO. 12, *supra* note 16, at 11.

101. That the canon—the Biden Condition—is claimed by the Senate to have constitutional underpinnings seemingly bolsters its validity.

102. President Reagan claimed that "the principles to treaty interpretation recognized and repeatedly invoked by the courts cannot be limited or changed by the Senate alone." 134 CONG. REC. S7664 (daily ed. June 13, 1988). This may or may not be correct, depending upon what principles he was referring to. Principles concerning ultimate constitutional authority obviously cannot be changed by Senate condition. The Senate could not, for example, accord itself final say as to the meaning of a treaty; treaty interpretation is, in the first instance, the task of the President and, in the end, the job of the courts. But principles concerning the construction of treaty terms clearly can be governed by Senate conditions. The Senate might provide, for example, that in the event of a conflict between two treaty provisions, the one specified will govern. Or it might provide by condition that a certain provision is to be construed broadly, or that a certain term of art will be accorded the same meaning it has in another treaty. Because the Senate can, in short, *alter* the meaning of a treaty provision by requiring modification before presidential ratification, it can also alter that meaning by imposing a canon that governs how that meaning is derived. The prescribed canon then is merely another provision subject to presidential interpretative authority.

103. RESTATEMENT (THIRD), *supra* note 5, § 303 cmt d.

104. *Id.* reporter's note 4.

proval—is clear from the report of the Foreign Relations Committee. It said:

[T]he President may not act upon the Senate's consent without honoring this Condition. Nothing that he or his Administration does, by statement or action, whether before or after the act of ratification, can alter the binding effect of any condition which the Senate places upon its consent to treaty ratification. If the President brings the INF Treaty into force, the Condition takes effect.¹⁰⁵

If President Reagan intended to challenge the wisdom or constitutionality of the Biden Condition, the time to act upon that doubt was before he ratified the Treaty. After ratification, Mr. Reagan's legal scrutiny might have been more properly directed to the constitutional requirement that he "take care that the laws be faithfully executed."¹⁰⁶ A treaty is a law,¹⁰⁷ and a Senate-added condition is part of a treaty.¹⁰⁸ The President cannot make an altogether new treaty and dispense with the requirement of Senate advice and consent by calling that treaty an "interpretation" of an earlier one. Nor can he amend an earlier treaty and escape the requirement of Senate approval (to what is in reality a new treaty) by calling the amendment an "interpretation."¹⁰⁹ The President's own semantic denomination of his act cannot control what procedure constitutionally is required. Beyond a certain point his authority ends and the Senate's begins; beyond a certain point an interpretation becomes a new treaty or an amendment to the old one.

The line between the two is not easy to draw. Senate Resolution 167 drew it in the same place as the Vienna Convention on the Law of Treaties¹¹⁰ and the *Restatement*,¹¹¹ both of which indicate that a treaty is to be construed in good faith in accordance with the ordinary meaning to be given its terms in light of their context and its object and purpose. When the President does so, he acts within the scope of his constitutional power. When his construction of a treaty cannot be so described, it represents not construction or interpretation at all, but the making of a new treaty. This he can do only with the advice and consent of the Senate.

105. S. EXEC. REP. NO. 100-115, *supra* note 93, at 100.

106. U.S. CONST. art. II, § 3.

107. The President "is charged with the Execution of the Laws, of which Treaties form a part . . ." ALEXANDER HAMILTON, *Pacificus*, in 15 THE PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett ed., 1969).

108. RESTATEMENT (THIRD), *supra* note 5, § 313.

109. "The President's power to terminate an international agreement does not imply authority to modify an agreement or to conclude a new one in its place." RESTATEMENT (THIRD), *supra* note 5 § 339, cmt. a.

110. See Vienna Convention, *supra* note 63, art. 31(1), 8 I.L.M. at 691-92, 63 AM. J. INT'L. L. at 885.

111. See RESTATEMENT (THIRD), *supra* note 5.

VII. TREATY TERMINATION

President Carter's decision to terminate the mutual security treaty with the Republic of China brought into question the extent of the President's power to terminate a treaty without Senate concurrence. Can the President on his own authority end an international agreement that had the full solemnity of the treaty-making advice and consent of the Senate?¹¹² What power has the Senate under the Constitution to control presidential termination of treaties?

For years, Presidents have opposed congressional proposals to limit the use of executive agreements to enter into international agreements on the theory that American credibility would be undermined.¹¹³ But the tables turned curiously when, upon President Carter's announced intent to terminate the mutual security treaty, it was members of Congress who charged the Executive with undermining United States credibility abroad.¹¹⁴ Senators previously among the foremost defenders of presidential power suddenly found themselves trying to cut it down to size,¹¹⁵ supported by legal commentators whose previous works undercut their new-found adulation for separation of powers.¹¹⁶ Result-oriented jurisprudence seldom rode higher.

The matter reached the Supreme Court in 1979 in *Goldwater v. Carter*.¹¹⁷ The Court divided sharply on the propriety of judicial involve-

112. For a recent study of the treaty termination question see DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* (1986).

113. An example of the Executive's concern arose in 1977, when the Senate Foreign Relations Committee asked for the Administration's comments on a proposal of Senator Clark's to amend internal Senate procedure so as to deny funding to an executive agreement which it believes should be a treaty. The State Department expressed concern "not only that the adoption of such a procedure might become a source of discord between the Senate and the Executive, but that important international undertakings might be jeopardized because of institutional conflict between the two Houses." Letter from Douglas J. Bennet, Jr., Assistant Secretary of State for Congressional Relations, to John J. Sparkman, Chairman of the Senate Foreign Relations Committee (Dec. 30, 1977), reprinted in 1 *FOREIGN REL. L.*, *supra* note 19, at 455.

114. See, e.g., 123 CONG. REC. 28,296 (1977) (speech by Sen. Goldwater opposing unilateral presidential treaty termination).

115. Compare Barry M. Goldwater, *President's Constitutional Primacy in Foreign Relations and National Defense*, 13 VA. J. INT'L L. 463 (1973) (arguing for presidential leadership in foreign affairs) with Goldwater, *supra* note 114 (calling presidential treaty termination without congressional approval unconstitutional).

116. Compare Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: International Instruments of National Policy*, 54 YALE L.J. 181, 336 (1945) (affirming power of President to terminate treaties with or without prior congressional authorization) with *Treaty Termination: Hearings on S. Res. 15 Before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. 382, 394 (1979) (statement of Professor Reisman to the Senate Foreign Relations Committee, on behalf of himself and Professor McDougal, stating that "the President cannot terminate these treaties on his own initiative, without an authorization") [hereinafter *Treaty Termination Hearings*].

117. 444 U.S. 996 (1979).

ment in the case. Six justices concluded that the case should be dismissed, but failed to agree in their reasoning.¹¹⁸ Oral arguments were never heard, and only one justice expressed an opinion on the substantive issues of the case.¹¹⁹ The ambivalence of the Court highlights the difficulty of reconciling domestic political pluralism with reciprocal international expectations.¹²⁰ Four principal positions shaped the debate. The State Department argued that the President can abrogate¹²¹ any treaty at any time.¹²² The sponsors of Senate Resolution 15 contended that Senate consent is required prior to the termination of any mutual security treaty.¹²³ The Senate Foreign Relations Committee concluded that the President could terminate a treaty acting alone, but (1) only in accordance with international law; (2) only if such termination would not "result in the imminent involvement of United States Armed Forces in

118. *Id.* Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and Stevens in reviewing the question as political and therefore non-justiciable. Justices White and Blackmun explicitly reserved judgment on the question's justiciability, while Justice Brennan thought that it was justiciable. Justice Powell thought the question justiciable, but not yet ripe; he preferred to postpone Court involvement until the potential executive-legislative conflict developed into actual confrontation. Despite his disagreement with the Rehnquist group on justiciability, Justice Powell joined them in voting for dismissal, as did Justice Marshall, who gave no reason for his vote. Thus, although a clear six-vote majority existed for dismissal, the Court was split four-four between those holding treaty terminations non-justiciable and those refusing so to hold, with Justice Marshall, by his silence, leaving the deadlock unresolved.

119. *Id.* at 1007 (Brennan, J., dissenting). Justice Brennan concluded that the President had the authority to terminate the treaty.

120. No doubt the Court's ambivalence also contributed to the avalanche of commentary on the subject. See, e.g., Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U.L. REV. 577 (1980); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties: The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979); Carl I. Gable, *Taiwan Relations Act: Legislative Re-Cognition*, 12 VAND. J. TRANSNAT'L L. 511 (1979); Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198 (1979); Louis Henkin, *Litigating the President's Power to Terminate Treaties*, 73 AM. J. INT'L L. 647 (1979); Edward M. Kennedy, *Normal Relations with China: Good Law, Good Policy*, 65 A.B.A. J. 194 (1979); *Legal Implications of the Recognition of the People's Republic of China: A Panel*, 72 AM. SOC'Y INT'L L. PROC. 240 (1978); Anna M. Pappas, *The Constitutional Allocation of Competence in the Termination of Treaties*, 13 N.Y.U. J. INT'L L. & POL. 473 (1981); Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 931 (1978); Comment, *Treaty Termination by the President without Senate or Congressional Approval: The Case of the Taiwan Treaty*, 33 SW. L.J. 729 (1979); Comment, *Resolving Treaty Termination Disputes*, 129 U. PA. L. REV. 1189 (1981); Comment, *The Constitutional Twilight Zone of Treaty Termination: Goldwater v. Carter*, 20 VA. J. INT'L L. 147 (1979); Note, *Unilateral Termination of the 1954 Mutual Defense Treaty between the United States of America and the Republic of China Pursuant to the President's Foreign Relations Power*, 12 VAND. J. TRANSNAT'L L. 133 (1979).

121. The Senate Foreign Relations Committee, in its treatment of the issue, used the word "terminate" to refer to treaty denunciations that are authorized by international law, and "abrogate" to refer to those that are not. This book uses the terms in the same way.

122. Memorandum from the Legal Advisor of the Department of State to the Secretary of State (Dec. 15, 1978), reprinted in 2 FOREIGN RELATIONS LAW, *supra* note 19, at 377-404.

123. S. Res. 15, 96th Cong., 1st Sess. (1979) provided: "Resolved, that it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." *Id.* The Senate never adopted this resolution.

hostilities or otherwise seriously and directly endanger the security of the United States;" and (3) only if unopposed by the Congress or the Senate.¹²⁴ Finally, Justice Brennan, the only member of the Court to address the issue, found the termination:

a necessary incident to Executive recognition of the Peking government, because the defense treaty was predicated upon the now abandoned view that the Taiwan government was the only legitimate political authority in China. Our cases firmly establish that the Constitution remits to the President alone the power to recognize and withdraw recognition from foreign regimes.¹²⁵

Justice Brennan's opinion gave no indication that his conclusion was limited to treaty terminations authorized by international law.

The *Restatement* appears to take a position close to that taken by the Senate Foreign Relations Committee.¹²⁶

The *Restatement* provides, in relevant part:

Section 339. Authority to Suspend or Terminate International Agreement: Law of the United States.

Under the law of the United States, the President has the power:

- (a) to suspend or terminate an agreement in accordance with its terms;
- (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by an

124. S. REP. NO. 119, 96th Cong., 1st Sess. 9-10 (1979). The report summarizes the circumstances in which, under "customary international law, as reflected generally in the Vienna Convention, *supra* note 63, a state may terminate a treaty, as follows:

- (1) in conformity with the provisions of the treaty;
- (2) by consent of all the parties after consultation with the other contracting states;
- (3) where it is established that the parties intended to admit the possibility of denunciation or withdrawal;
- (4) where a right of denunciation or withdrawal may be implied by the nature of the treaty;
- (5) where it appears from a later treaty concluded with the same party and relating to the same subject matter that the matter should be governed by that treaty;
- (6) where the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time;
- (7) where there has been a material breach by another party;
- (8) where the treaty has become impossible to perform;
- (9) where there has been a fundamental change of circumstances;
- (10) where there has been a severance of diplomatic or consular relations and such relations are indispensable for the application of the treaty;
- (11) where a new peremptory norm of international law emerges which is in conflict with the treaty;
- (12) where an error was made regarding a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound;
- (13) where a state has been induced to conclude a treaty by the fraudulent conduct of another state; and
- (14) where a state's consent to be bound has been procured by the corruption or coercion of its representatives or by the threat or use of force.

125. *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

126. *See supra* note 124.

other party or because of the supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or (c) to elect in a particular case not to suspend or terminate the agreement.¹²⁷

Its conclusion thus seems to be that, while presidential treaty "termination" is permissible, treaty "abrogation" is not;¹²⁸ abrogation could not, for example, have been effectuated with respect to the mutual security treaty with Taiwan without one year's notice, in accordance with the terms of article X of that treaty.¹²⁹ The comments following section 339 support the view that the President, acting alone, cannot abrogate a treaty: "The President's power to terminate an international agreement does not imply authority to modify an agreement or to conclude a new one in its place."¹³⁰ "The President's authority to terminate or suspend international agreements is implied in his office as it has developed over almost two centuries." The Reporters' Notes, by referring to termination as opposed to abrogation, are consistent with a denial of presidential abrogation authority.¹³¹ The President's power as "sole organ of the federal government in the field of international relations," they continue, ". . . would seem to include the authority to decide on behalf of the United States to terminate a treaty that no longer serves the national interest. . . ."¹³² Three cases are cited in support: *Charlton v. Kelly*;¹³³ *La Abra Silver Mining Co. v. United States*;¹³⁴ and *Frelinghuysen v. Key*.¹³⁵

None of these cases, however, support sole presidential treaty abrogation.¹³⁶ The Supreme Court has never upheld the authority of the

127. RESTATEMENT (THIRD), *supra* note 5, § 339.

128. *Id.*

129. Treaty of Mutual Defense, Dec. 2, 1954, United States-China, 6 U.S.T. 433, T.I.A.S. No. 3178.

130. RESTATEMENT (THIRD), *supra* note 5, § 339 cmt. a.

131. RESTATEMENT (THIRD), *supra* note 5, § 339 reporter's note 1.

132. *Id.* (quoting *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 310 (1936)).

133. 229 U.S. 447 (1913).

134. 175 U.S. 423 (1899).

135. 110 U.S. 63 (1884).

136. In *Charlton v. Kelly*, 229 U.S. 447 (1913), Charlton, an American wanted for the murder of his wife in Italy, argued that the Italian-American extradition treaty was no longer in force due to breaches by the Kingdom of Italy. The Court held that as the treaty had not been denounced by the Executive, it was one the courts were obliged to enforce. In *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899), the United States Government had successfully presented *La Abra's* claim against the Mexican Republic to an international claims commission. Later, having grounds to believe the claim had been fraudulent, Congress by statute directed the Executive to return to Mexico any funds obtained as a result of fraud, even though the treaty establishing the claims commission had said that the commission's decisions would be final. The Court held that it was "the absolute legal duty of the Secretary of State" to obey the statute, adding, "[i]t was competent for Congress to impose that duty upon him and he could not refuse to obey the mandate of the law." *Id.* at 462. In supporting its reasoning, the Court pointed out that "it has been adjudged that Congress

President to terminate a treaty lacking a termination clause on the basis of his sole judgment that it "no longer serves the national interest."¹³⁷ Indeed, in a number of cases it has effectively upheld the authority of the Congress to control the termination process, at least insofar as that process applies to the domestic effectiveness of a treaty (which is, of course, the only question on which the domestic courts of any country can rule).¹³⁸ The *Restatement's* unqualified observation that the President may "elect in a particular case not to suspend or terminate the agreement"¹³⁹ thus seems questionable.

The Senate rejected the Committee's recommendation, with some Senators expressing the belief that the fourteen grounds enumerated¹⁴⁰ were too extensive.¹⁴¹ In fact, the Committee's enumeration may not have been sufficiently exhaustive to encompass all circumstances in which sole presidential action is appropriate. Few would contend, for example, that congressional approval is required following a judicial determination of a treaty's unconstitutionality; in such an instance, consultation should occur with the Congress, or with the Senate, for the purpose of determining whether the court's opinion does indeed invalidate the treaty, and whether amendments to the treaty are desirable.¹⁴²

The reasons advanced for rejecting the approach are illuminating.¹⁴³

by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate." *Id.* at 460. Similarly, *Frelinghuysen v. Key*, 110 U.S. 63 (1884), involved an earlier stage in the *La Abra* controversy, which dragged on for over thirty years. President Arthur, concerned that American honor would be tarnished if this country were a party to perpetrating a fraud on a friendly power, ordered that no further payments be made on the *La Abra* claim, pending further negotiations. The Court, taking pains to show that the President's action was not at odds with the will of Congress, *id.* at 74-75, held that the President had the discretion to act as he had "under these circumstances." *Id.* at 75. While nothing in *Frelinghuysen* would seem to derogate from congressional authority, anything in it contrary to the Court's later holding in the same controversy in *La Abra* presumably was overruled by the later opinion.

137. *U.S. v. Curtis-Wright Corp.*, 229 U.S. 304.

138. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 720-21 (1893); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson*, 112 U.S. 580, 599 (1884); *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870). In addition, one of the cases cited in support of executive authority, *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899), actually seems to affirm congressional primacy. *Id.* at 460.

139. *RESTATEMENT (THIRD)*, *supra* note 5, § 339(c).

140. *See* note 124 listing the 14 grounds.

141. *See, e.g.*, 125 CONG. REC. 13,679 (1979) (speech by Sen. Harry F. Byrd, Jr.).

142. The Justice Department expressed to the Senate Foreign Relations Committee its opinion that "[t]he President cannot amend a treaty in any significant way by means of an executive agreement or parallel declaration of understanding after it has received the advice and consent of the Senate (unless, of course, the treaty sets forth a procedure for amendment or implementation in that way.)" Letter from Larry A. Hammond, U.S. Deputy Assistant Attorney General, to Frank Church, Senate Foreign Relations Committee Chairman (undated), *reprinted in Treaty Termination Hearings*, *infra* note 149, at 217, 220.

143. Those reasons are detailed in the report of the Senate Foreign Relations Committee on the

First, the argument for congressional primacy grounded on the Supremacy Clause¹⁴⁴ fails on several counts. The argument is that because treaties, like statutes, are the supreme law of the land, treaties, like statutes, cannot be terminated by the President alone. But as the Committee pointed out, treaties are *not* like statutes in one significant respect: “[a]lthough the Congress has the last word in determining whether a statute is enacted, the Senate merely authorizes the ratification of a treaty; it is the President’s role that is determinative.”¹⁴⁵ The Committee continued:

[The President] decides at the outset whether to commence treaty negotiations. He decides whether to sign a treaty. He decides whether to exchange instruments of ratification after a treaty has been approved by the Senate. At each of these stages, it is the President who has the power to determine whether to proceed—and thus whether treaty relations will ultimately exist.¹⁴⁶

Thus, as was suggested by the United States Court of Appeals,¹⁴⁷ the text of the Supremacy Clause may fairly be read only as a *status*-prescribing provision, not as a *procedure*-prescribing provision. That it assigns the same status—supreme law of the land—to each of the instruments denominated does not mean that it commands that the same procedure be followed in their termination.

Second, there is no reason why the termination of “mutual defense treaties”—or any other category of treaties, such as those representing a long-standing United States policy or a policy of supreme national importance—should be seen as subject to different constitutional principles than all other treaties. None of the constitutional sources of power supports the contention that one termination procedure applies to one set of treaties and another termination procedure to another set. As the Court of Appeals said in *Goldwater v. Carter*,

[t]here is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards. We know of no standards to apply in making such distinctions.¹⁴⁸

Byrd Resolution (S. REP. NO. 119, 96th Cong., 1st Sess. (1979) reprinted in 2 UNITED STATES FOREIGN RELATIONS LAW, *supra* note 19, at 411-452), its report on the Taiwan Enabling Act, (S. Rep. No. 7, 96th Cong., 1st Sess. (1979)) and the opinion of the United States Court of Appeals in *Goldwater v. Carter*, 617 F. 2d 697 (D.C. Cir. 1979), *cert. granted and dismissal directed*, 444 U.S. 996 (1979) which, although vacated by the United States Supreme Court, contains much useful analysis.

144. U.S. CONST. art. VI, § 2.

145. S. REP. NO. 7, 96th Cong., 1st Sess. 18 (1979).

146. *Id.* [emphasis in original].

147. *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

148. 617 F.2d 697, 707 (D.C. Cir. 1979), *cert. granted and dismissal directed*, 444 U.S. 996

The constitutional text does not address the matter. No Supreme Court case has reached the merits of the controversy. Although the Department of State argued vigorously that historical precedent supported a plenary presidential power to terminate the mutual security treaty with the Republic of China,¹⁴⁹ neither the Department nor opponents of that action even began to address the critical question of *opinio juris*—the shared belief of the political branches that the executive practice represented a juridical norm. It is thus difficult to find any constitutional custom on the matter; nor does there even appear to exist a *practice* of treaty abrogation, which apparently has occurred only once in American history, in 1798, in connection with treaties of alliance with France.¹⁵⁰ The intent of the Framers is thoroughly ambiguous. The most reasonable mode of analysis, therefore, given that the application of all other primary, secondary, and tertiary sources fails to resolve the issue, is to resort to functional considerations.

The issue, thus, is which of the political branches is best suited to make the determination that the Declaration should be terminated, taking into account factors such as the need for swiftness versus deliberation and secrecy versus diverse viewpoints.¹⁵¹

A functional approach is obviously imprecise, involving a subjective judgment concerning attributes of the two branches. Yet even the most cursory consideration would suggest that, viewed functionally, the argument for excluding Congress (or the Senate) from treaty termination is weak. The decision to withdraw from a treaty is almost never precipitated by an emergency that requires, say, secrecy or dispatch; such a decision looms on policy horizons for some months and is one that might benefit from the ventilation of diverse opinion in congressional hearings and debate.¹⁵² What is true of treaty negotiations is in this context

(1979). The Committee, too, doubted that any such distinction is constitutionally supportable. S. REP. NO. 119, 96th Cong., 1st Sess. at 8 (1979).

149. *Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 50 (1979) (testimony of State Dep't Legal Adviser Herbert Hansell).

150. *Treaty Termination: Hearings Before the Senate Comm. On Foreign Relations*, 96th Cong., 1st Sess. 310 (1979) (testimony of Prof. Abram Chayes).

151. See Chapter Two of MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990) for a discussion of the sorts of characteristics to be considered.

152. It has been suggested, for example, that the Panamanian Government has mismanaged portions of the Canal already turned over to it, and that that mismanagement may constitute breach of the Treaty, Larry Rohler, *Negligence Is Seen in Parts of Canal Ceded to Panama*, N.Y. TIMES, Mar. 7, 1988 at 1. If such breaches did occur and were "material," under international law, the United States would be permitted to denounce the Treaty. Because the principal performance obligation of the United States—transfer of the Canal to Panama—does not arise until 1999, however, and because the consequences of denunciation are so grave, involvement of Congress would seem all the more appropriate.

largely true of termination as well. "Thus we see," John Jay put it, "that the constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations on the one hand, and from secrecy and dispatch on the other."¹⁵³

Functional considerations thus suggest the propriety of some form of Congressional involvement at some stage in the resolution of the issue. But these considerations do not imply that *initial* resolution of the question by the President is improper. The act falls within the concurrent powers of the President. The President has *initiative* power, while Congress (or the Senate) has *reactive* power.¹⁵⁴ Under such an approach, the best conclusion is that, *in the face of congressional silence*, treaty termination by the President does not impinge upon the constitutional prerogatives of the Senate or Congress. As Professor Abram Chayes has put it, "[t]he structure of the overall distribution of the foreign affairs powers, then, seems, at least on first appraisal, to argue for the existence of an independent presidential initiative in treaty termination."¹⁵⁵

This was the approach taken by the Senate Foreign Relations Committee in reporting the Taiwan Relations Act.¹⁵⁶ The Committee there cited with approval¹⁵⁷ the tripartite analysis employed by Justice Jackson in his much-praised concurring opinion in the *Steel Seizure Case*.¹⁵⁸ After outlining the three categories,¹⁵⁹ the Committee stated:

Under this formulation, termination by the President of the U.S. - R.O.C. Defense Treaty would fall within the "zone of twilight" of category (2) and the President would, accordingly, appear to possess the constitutional authority to do so absent any statute enacted by the Congress or resolution adopted by two-thirds of the Senate directing

153. THE FEDERALIST NO. 64 at 436 (John Jay) (Cooke, ed., 1961).

154. For a similar analysis see *Treaty Termination Hearings*, *supra* note 149, at 306 (testimony of Prof. Abram Chayes).

155. *Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 311 (1979) (testimony of Prof. Abram Chayes). Chayes emphasizes, however, that the breadth of presidential power is a function of the posture of Congress. "The key question . . . is whether the President can act on his own in the first instance to give notice of termination without securing some form of congressional approval in advance. I put aside, once more, the issue of what he could do in the face of contrary congressional action." *Id.*

156. 22 U.S.C. § 3301 (Supp. 1980).

157. S. REP. NO. 7, 96th Cong., 1st Sess. 18-19 (1979).

158. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

159. Under Justice Jackson's analysis, presidential action can be classified into one of three categories - the first, in which the President's power is at a "maximum," encompassing action pursuant to congressional authority; the second, the so-called "zone of twilight," encompassing actions regarding which Congress has not expressed an opinion; and the third, in which his power is at its "lowest ebb," encompassing actions taken contrary to the will of Congress. *Id.*, see Chapter One, GLENNON, *supra* note 34.

contrary action: such measures would place the President's action in category (3). Similarly, his actions would have fallen with category (3) had the Congress enacted a statute prohibiting him, prospectively, from terminating a treaty by himself, or had the Senate done so by so providing in a reservation to the treaty itself or in a two-thirds resolution. . . .

It appears to the Committee, therefore, that the constitutional prerogatives of the Congress and the Senate have not been invaded in that neither the Congress nor the Senate has elected to exercise the powers granted it by the Constitution to participate in the process of treaty termination. Had either done so, a different conclusion would likely obtain.¹⁶⁰

Apparently concerned about the scope of Senate or congressional power asserted in the last sentence, the Justice Department indicated to the Committee that a "fundamental error" was found in its discussion of the *Steel Seizure Case*, and suggested that treaty termination "is a power that the President exercises alone":

Whether Congress may act depends on the nature of the President's independent powers. Jackson cites *Myers v. United States*, 272 U.S. 52 (1926), in a footnote to this discussion. There . . . the Constitution is silent upon removal of executive officers but removal was held to be a sole presidential power. The Constitution is silent on many points regarding foreign affairs but it does not follow that concurrent power exists. The most obvious is the power to speak for the nation as its representative in foreign affairs. It is clear that this is a power that the President exercises alone even though the Constitution does not deal specifically with the subject.¹⁶¹

The Committee, following enactment of the Taiwan Relations Act, next confronted the issue in the form of Senate Resolution 15. In its report on the Resolution, the Committee responded as follows:

[I]t cannot accept the notion advanced by Administration witnesses that the President possesses an "implied" power to terminate any treaty, with any country, under any circumstances, irrespective of what action may have been taken by the Congress by law or by the Senate in a reservation to that treaty. Such an argument in this context is at odds with the most fundamental precepts underlying the separation of powers doctrine. . . .¹⁶²

The *Restatement* takes the position of the Committee. The Reporters' Notes observe that the Senate "has not attempted to grant its consent to a treaty on condition that the treaty be terminable only with its con-

160. S. REP. NO. 7, 96th Cong., 1st Sess. 19 (1979) (emphasis added).

161. Letter from Larry A. Hammond, U.S. Deputy Assistant Attorney General, to Frank Church, Senate Foreign Relations Committee Chairman (undated), reprinted in *Treaty Termination Hearings*, *supra* note 149, at 217.

162. S. REP. NO. 119, 96th Cong., 1st Sess. 6 (1979).

sent or in accordance with some other prescribed procedure.”¹⁶³ But a condition “applicable to the treaty before it and having a plausible relation to its adoption,” the Reporters concluded, “would presumably be valid. . . and if the President proceeded to make the treaty, he would be bound by the condition.”¹⁶⁴

The position of the *Restatement* is sound. The Justice Department’s rationale—a textbook example of bootstrapping¹⁶⁵—is on close analysis an undifferentiated argument against the Senate’s power to condition its consent to treaties.¹⁶⁶ Such executive branch arguments—laying claim to sweeping presidential power which would overturn nearly two centuries of historical precedent—ultimately result in an erosion of executive

163. RESTATEMENT (THIRD), *supra* note 5, § 339 reporter’s note 3.

164. *Id.*

165. The Justice Department argued as follows:

Under our Constitution the power to do the greater, i.e., reject the treaty, does not necessarily include the power to do the lesser by any means whatever. It is well-settled that Congress cannot attach an unconstitutional condition to a benefit or power merely because it has authority to withhold the benefit or power entirely. . . . For example, Congress could, if it chose, bar aliens from our shores, but could not admit them under conditions which deprive them of constitutional rights such as the right to a fair trial.

Wing v. United States, 163 U.S. 228, 237 (1896). The issue here is very like the question addressed by the Supreme Court in the Myers Case. 272 U.S. 52 (1926). There the Court made clear that the existence of an advice and consent power in the Senate did not, by inference, also give the Senate the power to exert control over the removal of officers once approved. 272 U.S. at 164. *Treaty Termination Hearings*, *supra* note 149, at 217-18 (letter from Hammond, *supra* note 161). The Department, of course, is assuming the very point in contention by arguing that the Congress cannot “attach an unconstitutional condition.” Similarly, reference to Myers v. United States, 272 U.S. 52 (1926), assumes *ipse dixit* that attachment by the Senate of a termination condition to a treaty is constitutionally on the same footing as an exercise by the Senate of the removal power. Given the conclusion of the Supreme Court that the treaty power extends to “all proper subjects of negotiation between our government and the governments of other nations,” *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890), there can be little doubt, as the Committee argued, that a termination procedure would constitute such a subject. S. REP. NO. 119, 96th Cong., 1st Sess. 10-11 (1979).

Similarly flawed is the Justice Department’s argument that a Senate reservation on treaty termination relates to a “purely domestic” issue, and is therefore invalid under the Niagara reservation case, *Power Auth. v. Federal Power Comm’n*, 247 F.2d 538 (D.C. Cir.), *vacated as moot sub nom. American Pub. Power Ass’n v. Power Auth.*, 355 U.S. 64 (1957). The Committee correctly noted that “it is simply unconvincing to contend that a prospective treaty partner would be uninterested in how the United States will, internally, go about deciding whether to terminate its treaty obligations.” S. REP. NO. 119, 96th Cong., 1st Sess. 12 (1979). The RESTATEMENT, which criticizes the *Power Authority* decision, does not support the Justice Department argument. The Reporters noted:

The effectiveness of such a Senate proviso. . . does not depend on its becoming law of the land as a part of the treaty. Such a proviso is an expression of the Senate’s constitutional authority to grant or withhold consent to a treaty, which includes authority to grant consent subject to a condition. The authority to impose the condition implies that it must be given effect in the constitutional system.

RESTATEMENT (THIRD), *supra* note 5, § 303 reporter’s note 4.

166. The Committee responded by noting that, since granting conditional approval to the Jay Treaty in 1795, the Senate has very often granted conditional consent. “No such condition has ever been held invalid by the Supreme Court, and no President, so far as the Committee is aware, has ever indicated his intent, upon ratifying a treaty, to disregard a provision upon which the Senate conditioned its consent.” S. REP. NO. 119, 96th Cong., 1st Sess. 11-12 (1979) (footnotes omitted).

authority. Members of Congress who may be relatively indifferent about the outcome of a particular substantive issue may nonetheless care deeply about institutional prerogatives and thus support restrictive measures merely to establish the principle of legislative precedence.¹⁶⁷

Restraint is especially appropriate where the Executive is unlikely to persist in its objection. However willing the executive branch may be to object in the abstract to a hypothetical Senate condition concerning termination procedure, it is unlikely to interpose strenuous objections in a particular case. The reasons are, obviously, political. An indication by a President that he views a given Senate condition as unconstitutional, or the suggestion that he will feel free to ignore it, would virtually guarantee Senate rejection of a treaty.¹⁶⁸ Three recent significant treaties reported by the Senate Foreign Relations Committee—the two Panama Canal Treaties¹⁶⁹ and the SALT II Treaty¹⁷⁰—were reported with conditions at least as broad as the termination condition discussed by the Committee in hypothetical terms during consideration of the treaty termination issue.¹⁷¹ But none of the conditions to Senate consent to those treaties generated executive branch opposition, perhaps because they reflected—and were seen by the executive branch to reflect—legitimate concern in the Senate for the continued viability of its role in the treaty ratification process.

The approach outlined above is vastly different from saying that the President, in terminating a treaty, acts with plenary constitutional power. To say that would be to exclude Congress and the Senate from a reactive role. The President's power is not exclusive. Where the Senate specifies a procedure for termination, the President is compelled constitutionally to adhere to that procedure. Such a condition normally has the effect, constitutionally, of placing the President's power at its lowest ebb, for to terminate a treaty in such circumstances would be in direct opposition to the express will of the Senate.¹⁷² Thus the *Restatement* correctly recog-

167. As discussed above, when the Senate approved the Spanish Base Treaty, Jan. 24, 1976, United States-Spain, 27 U.S.T. 3005, it included a "declaration" in the resolution of ratification expressing the hope that the treaty would further the progress of democratic institutions in Spain.

168. Note, in this connection, President Reagan's objections to the "Biden Condition" to the INF Treaty, discussed earlier in this paper. His suggestion that he might disregard the Condition was made a week *after* he ratified the Treaty.

169. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, United States-Panama, Sept. 7, 1977, T.I.A.S. No. 10,029; Treaty on the Panama Canal, United States-Panama, Sept. 7, 1977, T.I.A.S. No. 10,030.

170. S. EXEC. Y. 96th Cong., 1st Sess. (1979).

171. S. REP. NO. 119, 96th Cong., 1st Sess. (1979) (S. Res. 15, Treaty Termination).

172. See *supra* note 155. During the Senate Foreign Relations Committee's hearings on the Byrd Resolution, the Justice Department took the position that the President's power to terminate treaties is exclusive. See *Treaty Termination Hearings*, *supra* note 149 (letter from Larry A. Ham-

nizes that

[i]f the United States Senate, in giving consent to a treaty, declares that it does so on condition that the President shall not terminate the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty.¹⁷³

As the reporters of the *Restatement* conclude, notwithstanding occasional suggestions to the contrary¹⁷⁴ such a condition must be given effect in the constitutional system even though it arguably is solely of domestic import.¹⁷⁵

If the Senate can prescribe a specific termination procedure as a condition to its consent to a given treaty, there is no reason to believe that Congress could not prescribe such a procedure by statute. This was the position taken by the Committee in its report on the Byrd Resolution.¹⁷⁶ Nor is there any reason to believe that a statute overturning the transmittal of a given notice of termination would be ineffective, at least if it were enacted before the effective date of the notice of termination.¹⁷⁷ It, too, would place the President's power at lowest ebb. Although this procedure would "deal in" the House of Representatives on the treaty power, not all members of the Senate Foreign Relations Committee were troubled.¹⁷⁸

mond to Frank Church, Chairman, arguing that "[i]t is clear that this is a power that the President exercises alone even though the Constitution does not deal specifically with the subject"). On close analysis the Justice Department position is little more than an undifferentiated argument against the Senate's power to condition its consent to treaties. See S. REP. NO. 119, 96th Cong., 1st Sess. 11-12 (1979); Michael J. Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy*, 52 U. CIN. L. REV. 84, 96-97 (1983).

173. RESTATEMENT (THIRD), *supra* note 5, § 339 cmt. a.

174. See *Power Authority v. Federal Power Commission*, 247 F.2d 538 (D.C.Cir. 1957), *vacated as moot sub nom.*, *American Pub. Power Ass'n v. Power Auth.*, 355 U.S. 64 (1957).

175. RESTATEMENT (THIRD) *supra* note 5, § 303 reporter's note 4. Whether this particular condition would in fact be of purely domestic concern is of course doubtful, and the practical utility of the test is questionable. See Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Power Reservation*, 56 COLUM. L. REV. 151 (1956).

176. S. REP. 15, 96th Cong., 1st Sess. 2 (1979).

177. Under international law, such an instrument may be revoked at any time before it takes effect. Vienna Convention on the Law of Treaties, May 23, 1969, Art. 64 U.N. Doc. A/CONF. 39/27, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. The United States has taken the position that a notice of termination may be withdrawn at any time before its effective date. See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 550 (1967); *In re Air Crash in Bali*, 684 F.2d 1301, 1305 (9th Cir. 1982).

In the absence of a specific time period provided in the treaty, a party is required to give not less than twelve months' notice of its intention to terminate a treaty. Vienna Convention, *supra* note 63, at art. 56, para. 2.

178. Some Senators expressed their feelings as follows:

THE CHAIRMAN. Congress can pass a law prescribing how either a given treaty can be terminated or a class of treaties. If the President joins in it, that, then, has the force of law.

This approach does not mean that the congressional power to direct the withdrawal of a given notice of termination is without constitutional limits. Such a directive may not interfere with the exercise of one of the President's *specific* plenary powers. Congress could not, for example, lawfully have overturned President Carter's notice of termination of the mutual security treaty with the Republic of China because such a law would have interfered with the President's plenary power to recognize and de-recognize foreign nations; a formal treaty relationship with a state is inconsistent with the status of non-recognition.

Just as Congress's concurrent power to *react* is not unfettered, neither is the President's concurrent power to *initiate* without limits. The power to initiate a given treaty termination, it must again be emphasized, exists only when the President acts pursuant to legislative approval or in the face of legislative silence. He may not initiate the termination of a treaty if that action is prohibited by law or by treaty. Treaty *termination* is therefore different, constitutionally, from treaty *abrogation*. A treaty is *terminated* when it is brought to an end in accordance with its terms. A treaty is *abrogated* when it is brought to an end in violation of its terms. In the case of abrogation the Senate has, in effect, explicitly stated its opposition to the President's act by expressing its advice and consent to a term of the treaty—its termination clause—which the President has disregarded. His power is then at its lowest ebb. Accordingly, the *Restatement* recognizes presidential power to terminate but not to

If the President vetoes it, then the Congress can override the President's veto and it will still have the force of law.

Senator SARBANES. Is it clear to you that a treaty can be terminated over the opposition of the President?

Senator JAVITS. By law.

THE CHAIRMAN. By law. . . . We are saying if the Congress passes a joint resolution over the President's veto, then he should not terminate that treaty. He would be inviting trouble. But I would take it a step further. I would hazard that if the Congress overrode a veto with a joint resolution which, under the Constitution, would have the force of law, the congressional position would be upheld in the courts as a constitutional proposition. I think I can make an awfully persuasive case for that position.

Mr. HENKIN. You are right, Senator. But I think one might distinguish general termination procedures from a particular agreement. I think the emphasis ought to be on particular agreements where Congress can make a special case. Then you avoid the rigors of that stark confrontation.

Sen. SARBANES. I agree with that point. . . . If you make the joint resolution general, then what you are doing is dealing in the House of Representatives on the treaty powers in a role on which I think some question can be raised as to whether it is an appropriate role for them.

Mr. GLENNON. I would point out that this, in effect, establishes a procedure not only for the repeal of treaty provisions but for the repeal of Senate reservations, as well, by a majority of the Senate acting in concurrence with a majority of the House and the President.

THE CHAIRMAN. If by the passage of a law that is inconsistent with a provision of a treaty, the treaty or the reservation can be undone, then it seems to me that it follows that a direct repeal should also be a valid way to undo a treaty provision.

S. REP. NO. 119, 96th Cong., 1st Sess. at 40-41 (1979).

abrogate a treaty,¹⁷⁹ and the Senate Foreign Relations Committee, in its report on the Byrd Resolution, recognized presidential power to initiate the ending of a treaty only when permitted by international law.¹⁸⁰

The distinction between termination and abrogation is therefore important constitutionally because treaty *termination* is permitted by international law whereas treaty *abrogation* is not. The customary norm of *pacta sunt servanda*, under which treaties are binding upon parties and which requires that they be performed by the parties in good faith,¹⁸¹ is violated when a treaty is abrogated. This norm has been called the glue that holds the international system together, and it is binding upon the President as a matter of domestic law.¹⁸²

Very different principles thus apply to the question of treaty abrogation. The issue of abrogation arose in connection with the 1984 modification¹⁸³ of the 1946 Declaration by which the United States accepted the compulsory jurisdiction of the International Court of Justice ("ICJ").¹⁸⁴ It also arises in connection with the seventy-some treaties that confer jurisdiction on the International Court in accordance with article 36(1) of the Statute of the International Court of Justice.¹⁸⁵ The Executive's abrogation of the 1946 Declaration on October 7, 1985, raised the possibility that some of these jurisdictional provisions might also have been the subject of termination efforts. If such review had taken the form of renegotiation of the treaty in question and if renegotiation had led to that treaty's termination, the principles discussed herein would have applied: treaty termination in accordance with its terms and in the face of congressional silence would place the President's act, constitutionally, in Justice Jackson's "zone of twilight."

If on the other hand the parties had agreed merely to an amendment to the treaty in question, a very different issue would have been raised. The constitutional power of the President to effect an amendment is far more limited than his power to carry out complete termination. This

179. RESTATEMENT (THIRD), *supra* note 5, § 339.

180. S. REP. NO. 96-119, 96th Cong., 1st Sess. (1979) (President may initiate the termination process in any of the fourteen situations permitted by the Vienna Convention on the Law of Treaties).

181. See Vienna Convention, *supra* note 63, at art. 56.

182. See Chapter Seven, GLENNON, *supra* note 34.

183. See generally Michael J. Glennon, *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 AM. J. INT'L L. 682 (1985).

184. 61 Stat. 1218 (1947).

185. Article 36(1) provides that "[t]he jurisdiction of the Court comprises all . . . matters specially provided for . . . in treaties and conventions in force." See generally Morrison, *Treaties as a Source of Jurisdiction for the International Court of Justice with Special Reference to the Practice of the United States of America*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (Lori F. Damrosch ed., 1987).

was acknowledged by both the Department of State¹⁸⁶ and the Department of Justice¹⁸⁷ during the dispute concerning termination of the mutual security treaty with Taiwan. Although not addressed directly by the *Restatement* the reasoning seems implicit in the proposition that "[t]he President's power to terminate an international agreement does not imply authority to modify an agreement or to conclude a new one in its place."¹⁸⁸ Were the President to amend an agreement on his own, he would in effect be terminating an old agreement and entering into a new one.

Perhaps for reasons such as these, the Reagan Administration made no effort to negotiate across-the-board removal of provisions in treaties providing for the adjudication of disputes by the ICJ under its compulsory jurisdiction. Indeed, it earlier had apparently recognized that treaty amendment lays beyond the scope of the President's sole authority. In announcing that the United States would not sign the 1982 Law of the Sea Convention,¹⁸⁹ President Reagan enumerated its "unacceptable elements" and said the United States wanted a treaty that would "[n]ot allow for amendments to come into force without approval of the participating states, including, in our case, the advice and consent of the Senate."¹⁹⁰ "[T]his is clearly incompatible with the United States approach to such treaties," the President later said.¹⁹¹ These concerns were reiterated by Ambassador James Malone, who complained that the Convention allowed for the adoption of amendments in a manner that "effectively bypass[es] U.S. approval, including congressional [sic] advice and consent."¹⁹² The Executive had thus declined to argue that it was possessed of plenary power to amend a treaty in violation of its terms. Such a power would vitiate the Senate's right to approve a treaty conditionally: under such an argument, any Senate-added reservation—together with any other unwanted provisions—could be unilaterally removed by the President. For similar reasons, the constitutional rationale proffered by representatives of the Department of State to justify the 1984 modification of the 1946 Declaration is unpersuasive. They argued that although the President cannot amend a treaty so as to *expand*

186. *Treaty Termination Hearings*, *supra* note 149.

187. *Id.* at 220-221.

188. RESTATEMENT (THIRD), *supra* note 5, § 339 cmt a.

189. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, reprinted in *The Law of the Sea: United Nations Convention and the Law of the Sea*, U.N. Sales No. E.83V.5 (1983).

190. 82 Dep't St. Bull., Mar. 1982, at 54.

191. 82 Dep't St. Bull., Aug. 1982, at 71.

192. 82 Dep't St. Bull. Oct. 1982, at 49. *See also* 82 Dep't St. Bull., May 1982, at 62 (similar statement by Ambassador Malone).

United States liability, he may constitutionally amend a treaty so as to *constrict* United States liability.

First, the argument creates false categories. It is easy to hypothesize an amendment that does neither. The oft-mentioned (before termination of the Declaration) possibility of an amendment which would have "traded" the Connally Reservation¹⁹³ for a "use of force" or "political question" exception is a good example; who can say whether the net effect of such an amendment would have been to expand or to constrict United States liability? Under this "test" the amendment process becomes an extended excursion into casuistry.

Second, even if one can distinguish the two categories, the assumption that a compact formally approved by the Senate can be caused to take an entirely new and different form without any Senate or legislative approval still has no constitutional basis. If the Senate were to condition its consent to a treaty upon an *increased* United States liability, by what authority might the President disregard the Senate's action? The power of the Senate to grant its conditional consent to a treaty, the Senate Foreign Relations Committee noted in 1978, is part of customary constitutional law in the United States.¹⁹⁴ Surely there is no constitutional basis for distinguishing between Senate conditions and "original" treaty text for purposes of presidential amendment authority.

VIII. CONCLUSION

The real objection of some commentators is not to the specifics of Senate participation in the treaty-making process—such as its power to approve a condition violative of international law, or its power to approve only the treaty presented to it by executive-branch negotiators—but rather to the treaty-making process itself set out in Article II, section 2, clause 2 of the Constitution. Their real, often unstated concern is that that process is undemocratic. Theories of democracy abound, but one need not delve deeply to suppose that the requirement of treaty approval by a super majority of two-thirds is indeed undemocratic. If the Constitution were drafted today we might reflect long and hard whether Senators representing only seven percent of the population—the 17 least populous states—ought to be able to defeat a treaty or to impose a condi-

193. I.C.J. Statute, art. 36(2)(b) (The Connally Amendment allows the United States to determine which disputes are within its domestic jurisdiction.).

194. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON EXECUTIVE N. S. REP. No 12, 95th Cong., 1st Sess. 11 (1978).

tion on their consent. Perhaps approval by a majority of both Houses, or of only the Senate, would make more sense.

But that is not what the Constitution requires. The rule of law does not permit us to redefine constitutional requirements to reflect "modern" notions of democracy. If the Constitution is to be made more democratic by altering law-making or treaty-making procedures set out in explicit text, that text must be amended by the process prescribed by the Constitution itself in Article V.

Before we take out the blue pencils we might remind ourselves that those who wrote its words were not strangers to democratic thought. The treaty clause itself has deep roots in democratic theory. Alexander Hamilton—no wallflower on the subject of presidential power—considered it "utterly unsafe and improper" to entrust the power of making treaties to the President alone.¹⁹⁵ The requirement of two-thirds Senate approval is directed at ensuring that significant international commitments undertaken by the United States have the overwhelming support of the American people. We have learned, to our sorrow, that when significant national commitments are made without the support of the people, the results can be tragic and costly, in systemic legitimacy as well as human life.

The temptation is ever present to side step domestic requirements concerning treaty approval—the diplomatic benefits are on occasion undeniable. On such occasions it may be well to recall the words of the Senate Foreign Relations Committee:

The constitutional role of the Congress has too often been short-circuited because it was viewed—in the executive branch and even by some members of Congress—as an impediment to the expeditious adoption of substantive policies commanding the support of a majority. Thus, when in our recent history the substance of those policies lost that support, the procedures once available as checks had atrophied, and the Congress was forced to struggle to reclaim its powers. The lesson was learned the hard way: procedural requirements prescribed by the Constitution must not be disregarded in the name of efficiency, and the substance of a policy, however attractive, can never justify circumventing the procedure required by the Constitution for its adoption.¹⁹⁶

195. See *supra* note 107.

196. S. REP. NO. 119, 96th Cong., 1st Sess. at 5-6 (1979) (treaty termination).